INDEX

Statement of the Case 1

Argument 2

CASES CITED

Baltimore and Ohio Southwestern Railroad Co. vs. Burtch, 263 U. S. 540, 68 L. Ed. 433, 44 S. Ct. 165 8

Baltimore and Ohio Southwestern Railroad Co. vs. Settle, 260 U. S. 166, 67 L. Ed. 189 7

Champlain Realty Co. vs. Brattleboro, 260 U. S. 366, 67 L. Ed. 309 8

Dahnke-Walker Milling Co. vs. Bondurant, 257 U. S. 282, 66 L. Ed. 239 5

Eureka Pipe Line Co. vs. Hallanan, 257 U. S. 265, 66 L. Ed. 227 5

Hooven & Allison Company vs. Evatt, 324 U. S. 652, 89 L. Ed. 1252 5

Hughes Brothers Timber Co. vs. Minnesota, 272 U. S. 469, 71 L. Ed. 359 8

Memphis Steam Laundry Cleaner, Inc., vs. Stone, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424 10

Michigan-Wisconsin Pipe Line Co. vs. Calvert, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 326 ..... 8, 10

Minnesota vs. Blasius, 290 U. S. 1, 78 L. Ed. 131 8

Puget Sound Stevedoring Co. vs. State Tax Commission, 302 U. S. 90, 82 L. Ed. 68, 58 S. Ct. 72 8

Railway Express Agency vs. Virginia, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558 ..... 8, 10

Spector Motor Service vs. O'Connor, 340 U. S. 602, 95 L. Ed. 573 10

United Fuel Gas Co. vs. Hallanan, 257 U. S. 277, 66 L. Ed. 234 5

United States vs. Erie Railroad Co., 280 U. S. 98, 74 L. Ed. 187 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 385.

DUNN BROS., INC., APPELLANT,

VS.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, REVIVED AS ALEX McKEIGNEY, CHAIRMAN OF STATE TAX COMMISSION, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellant files this brief opposing appellee's motion to dismiss or affirm.

STATEMENT OF THE CASE.

The statement of the facts contained in appellee's motion to dismiss or affirm, with one glaring exception, is substantially correct. For this reason, no statement is here made beyond what is deemed necessary to correct this obvious mistake on the part of appellee.

In appellee's statement of facts appears the following statement: "When the pipe arrived at the railroad station to which it was billed, it was inspected by agents of the Tennessee Gas Transmission Company, accepted by it and turned over to appellant for transportation from the railhead to the pipeline right-of-way." This is not a correct statement of the facts. Appellee, in this statement, is apparently adopting the language of the Mississippi Supreme Court. This language was never used by appellee in any of his briefs before the Mississippi Supreme Court and is a contradiction of the agreed statement of facts.

The agreed statement of facts in this case makes it clear that the inspection by Tennessee Gas Transmission Company at the end of the railroad portion of the journey was *not* for the purpose of accepting delivery or taking possession of the property so as to terminate the interstate transportation, but was solely *an inspection for the purpose of ascertaining whether the property had been damaged or lost during the railroad portion of the journey.* It is stipulated that the intention of Tennessee Gas Transmission Company in ordering the shipment of pipe from manufacturers located in the State of California was that the pipe be transported from the point of manufacture directly to the pipeline right-of-way within the State of Mississippi "by the most direct route available," and that the "various railheads within the State of Mississippi to which the pipe moved by railroad were never intended" by the shipper "to be the ultimate destination of the pipe" (R. 58).

With respect to the inspection at the end of the railroad portion of the journey, the agreed statement of facts is as follows (R. 59):

> "When the pipe arrived at the end of the railroad portion of the journey, within Mississippi, a

representative of the Tennessee Gas Transmission Company and a representative of the plaintiff would check the pipe while it was still on the rail cars, for the purpose of ascertaining the condition of the pipe, and to see if the pipe had suffered any damage in transit, or to determine whether any of the pipe had been lost in transit. The plaintiff would take possession of the pipe while it was still on the railroad cars and would unload the pipe from the rail cars."

The stipulation of facts also provides as follows (R. 59):

"From the time the pipe left the manufacturer in California until the pipe arrived at the right-of-way, the pipe was at all times under the care and supervision of the aforementioned common carrier, either railroad or the plaintiff."

These are the actual facts as stipulated by the parties, and for appellee to state that Tennessee Gas Transmission Company "accepted" the pipe at the end of the railroad portion and then "turned" the pipe over to appellant is simply a misstatement of the facts.

The shipper, Tennessee Gas Transmission Company, simply made notes as to any damage or loss that had been sustained on the railroad portion of the journey. The railroad turned the pipe over to appellant to complete the interstate journey which had been contemplated and intended from the very beginning. There was no interruption whatsoever of the interstate transportation. Appellant "would take possession of the pipe while it was still on the railroad cars."

Appellee further makes the point that the stipulation of facts did not refer to the Carmack Amendment to the Interstate Commerce Act. We do not believe that it is customary or proper to stipulate as to the existence of

a statute. The stipulation was limited to the "facts" and then the law is applied to the facts. In this case, the extent and the purpose of the inspection by Tennessee Gas Transmission Company was stipulated, so that there would be no question in this regard. The reason the inspection was necessary was because the provisions of the Carmack Amendment were not available to the parties, there being separate bills of lading. Under these circumstances, it was necessary, or certainly advisable, that the shipper be in a position to tell which carrier had possession of the pipe when a loss or shortage occurred. This is simply good business practice. Interchanging carriers themselves attempt to make this check by notations on the waybills, even where there is a through bill of lading. This was simply an additional precaution taken by the shipper and had no effect whatsoever upon the interstate character of the movement. The shipper simply did not want to become involved in an argument as to which carrier was responsible for any damage to or loss of the pipe. In order to avoid any such argument, it simply inspected the pipe as it was delivered by the railroad to the trucking line. The purpose of this inspection was agreed upon by the parties and any conclusion other than that as stipulated is contradictory to the actual facts as stipulated.

ARGUMENT.

The only ground assigned by appellee in his motion to dismiss or affirm is that "a substantial federal question is not presented in this case." Accordingly, this is the only point that we will discuss in this reply brief.

The first position urged by appellee in his argument is that "a federal question does not arise when a state court holds that a statute applies only to domestic transportation." He concedes that this Court has a right to

determine for itself what is interstate commerce, but then concludes that this Court "is bound by the construction which a state court places on its own statutes."

Certainly, there is no merit in this position. If it be assumed that the Mississippi Court has held that the tax applies only to intrastate commerce, a federal question at once emerges, to-wit: The question of whether the transportation in question is in intrastate or interstate commerce. This Court will decide that question for itself from the facts in the record.

In *Hooven & Allison Company* v. *Evatt*, 324 U. S. 652, 659, 89 L. Ed. 1252, 1260, the Court said:

> "In all cases coming to us from a state court, we pay great deference to its determination of fact. But when the existence of an asserted Federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained."

It is fundamental that the determination of what constitutes interstate commerce is a matter of federal law, and the decisions of this Court are conclusive on that question. This Court will determine for itself the necessary operation and effect of a state law which is challenged on the ground that it violates the Commerce Clause. Indeed, the typical and usual case of federal jurisdiction arises in situations where a state court holds that a particular transaction is intrastate rather than interstate, and that on such basis a state statute may be applied and enforced. *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 270, 66 L. Ed. 227, 231; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 66 L. Ed. 234.

The second position urged by appellee in his argument is that "the incidence of appellant's tax was intrastate transportation." Here we have appellee stating again that the tax here sought to be collected is imposed upon the business itself. It is his position that this business is intrastate business. We have no argument with some of the abstract statements of law presented by appellee; however, they have no application to this case. The question here is whether the transportation sought to be taxed was in intrastate or interstate commerce. We will not again repeat the facts as agreed upon by the parties. These facts are clear and undisputed. The "essential character" of the movement is stipulated. The only differences between the shipment in this case and a shipment by one carrier under one through bill of lading are as follows: (1) There was no through bill of lading; the shipment being moved partly by rail and partly by trucks; and (2) the shipper inspected the property when it was delivered by one carrier to the next carrier.

We have previously pointed out that the parties agree as to the purpose of the inspection by the shipper, and certainly a simple inspection for the purpose of being in a position to determine where any loss or damage occurred is not an interruption of an interstate movement. This leaves us with the sole and only difference being that two bills of lading were issued instead of one. *As we stated in our Jurisdictional Statement, the effect of the Mississippi Supreme Court decision is to make the issuance of two bills of lading absolutely controlling even though the intent is clear.* We submit again that this is the only conclusion that can be drawn from the opinion of the Mississippi Supreme Court. Appellee, in his brief, has not taken issue with this statement even though he does discuss the "inspection" by the shipper. He continues to refer to this "inspection" as an "acceptance" by the shipper.

This is at variance with the agreed statement of facts—merely making notations as to damage done or loss of property, while the property remains in the care and custody of common carriers, certainly does not constitute an acceptance of the shipment by the shipper so as to change the character of the shipment from interstate to intrastate.

We believe that one quotation from the case of *Baltimore and Ohio Southwestern Railroad Co.* v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192, is sufficient authority that the entire movement was in interstate commerce and also disposes of this point. In that case, this Court stated as follows:

> "Under these circumstances, the intention, as it was carried out, determined, as matter of law, the essential nature of the movement; and hence, that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence or absence of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic."

Another case directly in point is *United States* v. *Erie Railroad Co.*, 280 U. S. 98, 74 L. Ed. 187.

The inspection for the purpose of ascertaining loss or damage did not break the continuity of the interstate journey. This inspection was a mere incident to the journey, made necessary by the change in the mode of transportation by which the pipe was carried from a place in

California to a place agreed upon in Mississippi. *Hughes Brothers Timber Co.* v. *Minnesota*, 272 U. S. 469, 475, 71 L. Ed. 359, 362.

It is certainly well-settled by the many decisions of this Court that the activity of appellant in transporting this pipe was an integral part of the interstate movement and cannot be separated therefrom. *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90, 82 L. Ed. 68, 58 S. Ct. 72; *Baltimore and Ohio Southwestern Railroad Co.* v. *Burtch*, 263 U. S. 540, 68 L. Ed. 433, 44 S. Ct. 165; *Minnesota* v. *Blasius*, 290 U. S. 1, 9, 78 L. Ed. 131, 136; *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366, 67 L. Ed. 309; *Hughes Brothers Timber Co.* v. *Minnesota*, 272 U. S. 469, 71 L. Ed. 359.

It is equally well-settled that an integral part of interstate commerce is not subject to state taxation for the privilege of engaging in such commerce within the state. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583; *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757.

The third position urged by appellee in his argument is that "a state may tax gross proceeds of interstate commerce."

Here we have appellee taking the position that interstate commerce must pay its way, and therefore a state can levy a tax on the privilege of engaging in this commerce. Appellee concedes that the tax here sought to be imposed is on the privilege of engaging in the commerce. Yet, he still contends that the tax can be levied and collected by the State of Mississippi on purely and exclusively interstate commerce. The question here is not whether interstate commerce must be made to pay its way, but whether this particular tax can be levied and collected by the State of Mississippi from a carrier doing wholly and exclusively

interstate commerce in the State of Mississippi. The Supreme Court of the State of Mississippi held that the tax could be levied and collected in this instance because it was not shown that the interstate carrier paid other or different taxes to the State of Mississippi. It is interesting to note that appellee has not even advanced this argument in his motion. This holding by the Mississippi Supreme Court is quite clear, and, as pointed out in our Jurisdictional Statement, would establish a new principle of constitutional law. Certainly, the establishment of such a new, novel and different principle of constitutional law raises a substantial question. It was pointed out in our Jurisdictional Statement that if the opinion of the Mississippi Supreme Court is left standing, "then privilege taxes can be imposed directly upon the privilege of engaging in interstate commerce by the various states, unless it is shown that the states are paid other taxes." Appellee has not taken issue with our statement. If left standing, the opinion of the Mississippi Supreme Court will have created a way to circumvent and make almost meaningless the Commerce Clause of the Federal Constitution. If this does not present a substantial question, then we can think of no case that could present a substantial question.

It would unduly lengthen this reply for us to comment specifically on each case cited by appellee. We believe it to be sufficient to state that not one of them is in point from a factual standpoint or authoritative from a legal standpoint insofar as the issue now being presented to this Court is concerned. There is no question of apportionment here. There is no question of interstate commerce paying its way involved in this case. There is no question of taxation in connection with local protection involved in this case. The simple question here involved is whether a state can levy a privilege tax upon the privilege of doing a purely and exclusively interstate business.

The decisions of this Court beginning with *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573, and including *Memphis Steam Laundry Cleaner, Inc.*, v. *Stone*, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424; *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396; and *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558, control the present case, and dispose of every contention advanced by appellee. It is significant that appellee makes no effort to discuss and distinguish these decisions.

It is submitted that the questions involved in this case are of public importance and so substantial as to require plenary consideration by this Court.

Respectfully submitted,

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INDEX

Petition for Rehearing 1
Reasons for Granting Rehearing 2
Point I 5
Point II 10
Conclusion 14
Certificate 15
Certificate of Service 15

Cases Cited

Baer Bros. Mercantile Co. v. Denver & Rio Grande R. R. Co., 233 U. S. 479, 58 L. Ed. 1055 5
Baltimore & Ohio S. W. R. Co. vs. Settle, 260 U. S. 166, 67 L. Ed. 189 ..... 5, 8
Bisceglia Contract Carrier Application, 34 M. C. C. 233 7
Champlain Realty Co. vs. Brattleboro, 260 U. S. 366, 67 L. Ed. 309 9
Cox, Common Carrier Application, 26 M. C. C. 502 (1940) 7
The Daniel Ball, 10 Wall., 77 U. S. 557, 19 L. Ed. 999 5
Dunn Contract Carrier Application, 28 M. C. C. 476 6
Hughes Bros. Timber Co. vs. Minnesota, 272 U. S. 469, 71 L. Ed. 359 9
Michigan-Wisconsin Pipe Line Company vs. Calvert, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 326 ..... 11, 13, 14
Minnesota vs. Blasius, 290 U. S. 1, 78 L. Ed. 131 9
Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. Ed. 394 5
Petroleum Carrier Corporation, Common Carrier Application, 48 M. C. C. 719 7
Puget Sound Stevedoring Co. vs. State Tax Commission, 302 U. S. 90, 82 L. Ed. 68 12

Railway Express Agency vs. Virginia, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558 12
Spector Motor Service, Inc., vs. O'Connor, 340 U. S. 602, 95 L. Ed. 573 11
State Tax Commission vs. Interstate Natural Gas Company, 284 U. S. 41, 76 L. Ed. 156 9
United States vs. Erie Railroad Company, 280 U. S. 98, 74 L. Ed. 187 ..... 6, 8
Walter M. Chambers—Extension—Baxterville, Mississippi, Oil Field, 8 F. C. C. 32, 125 7
William F. Crossett—Extension, 8 F. C. C. 31, 970 7

OTHER AUTHORITIES

Annotation, 74 L. Ed. 192 5
41 A. B. A. Journal, July, 1955, page 603 13
Section 10105, Mississippi Code of 1942 10
Section 10126, Mississippi Code of 1942 10

IN THE
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DUNN BROS., INC., APPELLANT,

VS.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, REVIVED AS ALEX McKEIGNEY, CHAIRMAN OF STATE TAX COMMISSION, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

PETITION FOR REHEARING.

Appellant prays that this Court grant rehearing of its decision of November 7, 1955, dismissing the appeal in this cause for want of a substantial federal question, and that upon such rehearing this Court note probable jurisdiction in this cause and set the case for hearing on its merits.

REASONS FOR GRANTING REHEARING.

This appeal presents the following questions:

1. Whether the Commerce Clause is infringed by the Mississippi Sales Tax Law which, as applied to appellant, imposed a privilege tax upon the privilege of carrying on that portion of an interstate motor carrier's business which consisted of receiving certain pipe from railroads at various points in Mississippi, which pipe had been shipped from California, and continuing the transportation of such pipe to other points in Mississippi on the right-of-way of an interstate pipe line, where the stipulated facts showed that it was the continuing intent of the shipper at all times that said pipe be transported by common carrier from the point of manufacture in California to the pipe line right-of-way within Mississippi; that the railheads were never intended to be the ultimate destination of the pipe; and the pipe was so transported from California to the rights-of-way in Mississippi by the most direct route available; and the stipulated facts further show that from the time the pipe left the manufacturer in California until the pipe arrived at the right-of-way in Mississippi, the pipe was at all times under the care and supervision of said common carriers, either railroad or appellant?

2. Whether the operations of the motor carrier described above were exclusively in interstate commerce?

3. If the operations of said motor carrier were exclusively in interstate commerce, whether the State of Mississippi may lawfully impose a privilege tax as a condition precedent to the carrying on of such activities in interstate commerce?

The present case is a test case which affects the rights of all other motor carriers in this nation which perform services similar to those performed by appellant. The decision in this case affects the operations of such carriers in practically every one of the 48 states. In view of the fact that there are several questions involved in this case, and the fact that the appeal was dismissed without any opinion, it is impossible for appellant and others similarly situated to know the basis of the Court's decision and its effect on their rights in other states.

It is impossible to determine whether the Court has determined that the operation in question is intrastate commerce and therefore subject to this privilege tax, or whether the Court has held that the operation in question is interstate commerce, but is nevertheless subject to the tax.

It is impossible to determine:

First: Whether this Court holds that the transportation in question is not interstate commerce, because:

A. The fact that this transportation is wholly within one state makes it intrastate commerce, or because

B. The use of two bills of lading and the change of the mode of transportation from rail to truck renders the motor carrier movement intrastate commerce; or because

C. The inspection at the end of the rail journey terminated the interstate transportation so as to render the motor carrier movement intrastate commerce.

Or:

> Second: Whether the Court has held that even though the activities of appellant were solely and exclusively in interstate commerce, nevertheless appellant must pay the privilege tax as a recompense for the benefits and protection which the State of Mississippi afforded to appellant while it was engaged in these activities.

In order that appellant and others similarly situated may be informed of their rights in others of the forty-eight states in which they operate, it is essential that the basis of the holding be made clear. For example, if the sole basis of the holding is that the inspection at the end of the railroad portion of the journey terminated the interstate commerce, appellant and its customers might well dispense with such inspection in the future.

In any event, regardless of what the basis of the dismissal of this appeal may have been, it is respectfully submitted that this Court erred in such dismissal. We can only feel that we must have failed to make clear to the Court the precise nature of the transportation involved, and the precise nature and effect of the tax sought to be imposed.

It is submitted that whatever the basis of the dismissal, the decision is erroneous and violates legal principles firmly established by the decisions of this Court.

I.

If this Court holds that the transaction was not in interstate commerce because the truck portion of the journey took place wholly within a single state, then such holding is in direct conflict with decisions of this Court which have never been questioned. It is established law that the fact that a movement takes place wholly within a single state does not necessarily make such movement intrastate commerce, and that where the commodity being transported is destined for or is received from places outside the state, then the movement within the state is an interstate movement where the essential character of the entire movement is interstate.

The Daniel Ball, 10 Wall., 77 U. S. 557, 19 L. Ed. 999.

Norfolk & Western R. Co. v. *Pennsylvania*, 136 U. S. 114, 118, 119, 34 L. Ed. 394, 397.

Baer Bros. Mercantile Co. v. *Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 490, 58 L. Ed. 1055, 1062.

Annotation, 74 L. Ed. 192.

It is undisputed in the present case that all of the activities of appellant were a part of an actual and intended interstate movement which had been arranged in advance by the shipper in the course of carrying out a continuing intention that the commodity in question be transported from California to its ultimate destination on the pipe line right-of-way in the State of Mississippi. Under these circumstances, the intention, as it was carried out, determined, as a matter of law, the essential nature of this movement; and hence, that this entire shipment, including the truck portion of the journey, was an interstate shipment.

Baltimore & Ohio S. W. R. Co. v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192.

United States v. *Erie Railroad Company*, 280 U. S. 98, 74 L. Ed. 187.

If this Court has held that the movement in question is not in interstate commerce because wholly within Mississippi, then the holding of this Court is in conflict with an unbroken line of decisions of the Interstate Commerce Commission and the lower Federal Courts. We recognize that the decisions of the Interstate Commerce Commission are in no sense binding on this Court. The Interstate Commerce Commission, however, is a special body whose sole purpose and duty is to regulate interstate commerce. Certainly the decisions of such a body in cases involving *identical* factual situations should be persuasive. But we cite these decisions of the Interstate Commerce Commission, not so much as persuasive authority, but as illustrating the fact that the questions involved in this case, which the Court has dismissed as insubstantial, are in fact very substantial and of vital importance to the entire transportation industry. If this Court holds that a movement of the nature herein involved is not in interstate commerce, then all of the decisions of the Interstate Commerce Commission dealing with such movements are in error. Yet, because of the method of disposition of this appeal, there is no way of knowing whether the Court has in fact held that the movement in question did or did not constitute interstate commerce.

The Interstate Commerce Commission has held with reference to the identical factual situation involved in the present case, with the appellant itself being involved, that the operations of appellant are in interstate commerce. In *Dunn Contract Carrier Application*, 28 M. C. C. 476, the Interstate Commerce Commission said:

> "Protestant rail carriers contend that applicant's operation within one State from rail car to job site is

not a movement in interstate or foreign commerce. The facts also raise the issue as to whether this transportation along the private right-of-way is subject to our regulation. *The pipe-line company purchases its right-of-way and knows precisely where the new pipe is destined when it places its order with eastern mills. It then designates each rail delivery point to which the pipe is to be shipped, with the amount to be delivered, which points are selected so as to be nearest the site of construction in order to reduce the truck haul to a minimum. Under these circumstances, we conclude that the movement by motor vehicle of new pipe from rail points to points of use is a continuing interstate movement and that the portion of the truck haul which is conducted over private right-of-way as well as that over the public highways is subject to our jurisdiction under the act"* (Emphasis added).

Other decisions of the Interstate Commerce Commission which are to the same effect are:

Cox, Common Carrier Application, 26 M. C. C. 502 (1940).

Walter M. Chambers—Extension—Baxterville, Mississippi, Oil Field, 8 F. C. C. 32, 125.

William F. Crossett—Extension, 8 F. C. C. 31, 970.

Petroleum Carrier Corporation, Common Carrier Application, 48 M. C. C. 719.

Bisceglia Contract Carrier Application, 34 M. C. C. 233.

Numerous other decisions to the same effect could be cited, but the foregoing will illustrate the seriousness of the problem created if this Court means by its dismissal that the movement involved in the present case was not in interstate commerce.

As stated, motor carriers engaged in the identical type of operation involved in the present case operate in every

one of the forty-eight states. If this Court holds that such operations are not in interstate commerce, the interstate status of such carriers within each state will be eliminated, and each state may assess a privilege tax on such operations.

If by the dismissal of the appeal this Court means to hold that the use of two bills of lading and the change of the mode of transportation from rail to truck renders the motor carrier movement intrastate commerce, then its decision is equally erroneous.

If the railroad had transported the pipe to its rail terminals by rail and had then transported it to the right-of-way by its own trucks, all under one bill of lading, certainly no one would deny that the truck portion of the journey was in interstate commerce. The absence of a through bill of lading, and the fact that two carriers are used instead of one does not change the nature of the commerce.

Baltimore & Ohio S. W. R. Co. v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192.

United States v. *Erie Railroad Company*, 280 U. S. 98, 74 L. Ed. 187.

If by the dismissal of the appeal the Court does not mean to hold that the movement in question was intrastate because it took place wholly within the bounds of one state, or because of the change in the mode of transportation, but, on the other hand, means to hold that the interstate journey terminated because of the inspection at the railhead, then again we say that the decision of this Court is contrary to all established precedents on the subject.

This inspection did not constitute an acceptance of the commodity by the shipper-consignee, but was solely for the purpose of determining whether or not damage or loss had

occurred in transit during the railroad portion of the journey. This inspection was a mere incident to the journey, made necessary by the change in the mode of transportation (*i. e.* from rail to truck) by which the pipe was carried from its origin in California to its ultimate destination along the pipe line right-of-way in Mississippi.

Hughes Bros. Timber Co. v. *Minnesota*, 272 U. S. 469, 475, 71 L. Ed. 359, 362.

Incidental dealings with a moving commodity do not break the continuity of interstate transportation. *State Tax Commission* v. *Interstate Natural Gas Company*, 284 U. S. 41, 76 L. Ed. 156, 157.

An interstate movement which has once begun is regarded as continuing despite a temporary interruption due to necessities of the journey, or for the purpose of safety and convenience in the course of the movement. *Minnesota* v. *Blasius*, 290 U. S. 1, 78 L. Ed. 131; *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366, 67 L. Ed. 309.

There can be no question but that the interstate movement of this pipe had begun when the pipe was delivered to the railroad in California for shipment to its ultimate destination on the right-of-way in the State of Mississippi. Once this interstate journey had begun, it continued until the goods reached their final destination and became an inseparable part of the mass of property within the State of Mississippi. The mere changing of the mode of transportation from rail to truck did not change the essential interstate character of the movement.

The present case does not involve any so-called casual or incidental movement of transportation wholly within a single state immediately preceding or following interstate transportation. It is undisputed in the present case that before the shipper turned the pipe over to the railroad in Cali-

fornia, the shipper had made the necessary special arrangements with appellant to continue the transportation of this pipe from the railheads in Mississippi to the ultimate destination, which was the right-of-way in Mississippi. From the outset, it was intended that the pipe be transported from California to the right-of-way in Mississippi by the most direct route available. This intention persisted and continued, and was actually carried out. Under these circumstances, the truck portion of the journey must be viewed in its relation to the entire trip, rather than in isolation. Thus viewed, the transportation by appellant was an integral and constituent part of the interstate movement and cannot be separated therefrom.

It is respectfully submitted, therefore, that if this Court, by the dismissal of the appeal, has held that the movement in question was not in interstate commerce, such holding is erroneous and should be reconsidered.

II.

If, on the other hand, by the dismissal of the appeal, this Court means to hold that the activities of appellant were solely and exclusively in interstate commerce, but that nevertheless, appellant must pay the privilege tax, then again we say that the decision of this Court is erroneous and should be reconsidered.

The tax in question is admittedly a privilege tax, and one which is imposed as a condition precedent to engaging in business in Mississippi, and in addition to all other licenses and taxes levied by law. *Section 10126, Mississippi Code of 1942.* The Legislature of Mississippi has designated this tax as a privilege tax. *Section 10105, Mississippi Code of 1942.* The present tax in fact and in effect is just what the Mississippi Legislature said it was—a privilege

tax, and therefore one that cannot be applied to an exclusively interstate business.

The case of *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573, specifically held that the Commerce Clause prohibits a state from imposing a direct privilege tax upon a corporation engaged exclusively in the interstate transportation of freight. The Spector case further held that this is true even though the tax is nondiscriminatory and is apportioned to business done within a state.

If the dismissal of this appeal means that this Court holds that the operations in question are interstate but are nevertheless subject to privilege taxation by the state, then necessarily the decision in the present case is contrary to the decision in the Spector case.

If by the dismissal of this appeal this Court means to hold that the operations in question are interstate commerce, but constitute such a "local activity" that the privilege tax can be imposed, then the dismissal of this appeal is contrary to the decision in *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157; 98 L. Ed 583, 74 S. Ct. 326. This case clearly holds that a privilege tax on a local activity related to interstate commerce can be upheld only in cases where there is a genuine local activity *distinctly separate and apart* from the interstate commerce. In the preceding discussion we undertook to demonstrate that the movement within Mississippi was not distinctly separate and apart from the interstate commerce.

We have heretofore pointed out that the movement by appellant was an integral part of an actual interstate movement, which had been arranged in advance by the shipper in the course of carrying out a continuing inten-

tion that the commodity in question be transported from California to its ultimate destination in Mississippi. The transportation by appellant, under these circumstances, must be viewed in its relation to the entire trip, and thus viewed it was an integral and constituent part of the interstate movement. It is respectfully submitted that the movement involved here was an integral part of the interstate process which cannot realistically be separated from it. Certainly the taking possession of a commodity by a *carrier* for immediate continuation of interstate transportation is obviously and necessarily a part of the interstate transportation itself. *Puget Sound Stevedoring Co.* v. *State Tax Commission,* 302 U. S. 90, 82 L. Ed. 68.

The transportation of this pipe from California to its ultimate destination on the right-of-way in Mississippi in accordance with the intention of the shipper was an entire and integral economic process. The truck portion of the interstate journey was a constituent and integral part of such interstate process. This being true, it cannot be separated and subjected to the privilege tax here involved.

Further authority for this proposition is found in the case of *Railway Express Agency* v. *Virginia,* 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558, in which the Court held specifically that the local activities of "originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the state" were integral parts of the interstate commerce, and as such, they were not local activities upon which state privilege taxes could be based.

There is one proposition upon which the Court may have based the dismissal of the appeal which was not fully discussed in our Jurisdictional Statement and our Brief in Opposition to the Motion to Dismiss. We re-

frained from discussing this point because we thought it unnecessary in view of the recent decisions of this Court. We refer to the argument which frequently has been urged in the past that a state tax on interstate commerce should be upheld if it met the so-called "multiple burden test." That is to say, if there was no possibility of the tax being duplicated by another state, the tax should be upheld. This argument ignored the basic test of whether there is a direct burden on interstate commerce. This so-called "multiple burden test" was completely vitiated by the decision in *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 326.

The opinion by Justice Clark in that case points out that a state tax on interstate commerce is invalid if it burdens such commerce *either* (1) directly, *or* (2) by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. In the *Michigan-Wisconsin* case, the Court first very carefully invalidated the tax there involved because the activity sought to be taxed was "not so separate and distinct from interstate transportation" as to support the tax, and only then added, in one final paragraph, that the tax was *also* objectionable because it would "promote a multiple burden upon interstate commerce."

In commenting on this case in an article in *41 A. B. A. Journal, July, 1955, page 603*, James M. Marsh, former law clerk to Mr. Justice Jackson, states:

> "This again serves to illustrate that the multiple burden test is not so much a device for *validating* taxes, as it is an *additional hurdle* which challenged state levies must meet" (Emphasis by the author).

We say, therefore, that if by the dismissal of this appeal this Court means to hold that, even though the trans-

action is in interstate commerce, nevertheless it may be subjected to a direct privilege tax, then the effect thereof is to undermine one of the cornerstones of our constitutional law, which is that the federal privilege of carrying on exclusively interstate commerce cannot be subjected to direct privilege taxation by a state.

Nor does the fact that some benefits and protection may have been afforded to appellant by the State of Mississippi justify the imposition of this tax on a purely interstate activity. The benefits and protection afforded by a state to an interstate carrier are relevant only when the question of due process alone is involved. Benefits and protections afforded by a state are not material in determining the validity of a specific privilege tax under the Commerce Clause. *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157, 163, 98 L. Ed. 583, 590, 74 S. Ct. 326.

CONCLUSION.

For the reasons set forth above and in the Jurisdictional Statement and the Brief in Opposition to the Motion to Dismiss, it is respectfully urged that rehearing be granted, and that upon such rehearing probable jurisdiction be noted and this case set for oral argument.

Respectfully submitted,

CERTIFICATE.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Counsel.

CERTIFICATE OF SERVICE.

I, C. B. Snow, attorney of record for appellant, hereby certify that I have this day delivered to Honorable John E. Stone, State Office Building, Jackson, Mississippi, attorney of record for appellee, a true and correct copy of the above petition.

This the ..... day of November, 1955.

.....

C. B. Snow.